In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-753

GEORGE M. BOYD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a former major in the regular United States Air Force, contends that the Secretary of the Air Force acted arbitrarily and capriciously in declining to accept a recommendation of the Air Force Board for Correction of Military Records that petitioner be promoted to lieutenant colonel.

Petitioner was involuntarily retired from the Air Force pursuant to 10 U.S.C. 8913, because he had been twice considered and passed over for promotion to the permanent grade of lieutenant colonel. After he was passed over for promotion for the second time, petitioner applied for relief to the Air Force Board for Correction of Military Records. The Board recommended to the Secretary that petitioner be promoted to the temporary rank of lieutenant colonel and that his retirement be rescinded. On review, the Assistant Secretary of the Air Force for Manpower and Reserve Affairs, acting as the Secretary's

delegate (Pet. App. A2, n. 2), rejected the Board's recommendation "because he found no error or injustice in the record" (Pet. App. A2).

Petitioner then sought review of the Assistant Secretary's determination in the Court of Claims.[1] After a "careful examination of the considerable record" (Pet. App. A10), the court sustained the Assistant Secretary's determination as not arbitrary or capricious.

This case presents essentially factual questions concerning the correctness of the "overall evaluation" and "promotion potential" ratings used in considering petitioner for promotion. Petitioner's principal argument here (Pet. 4-9) is that those ratings did not fully reflect the favorable assessments of his superior officers.[2] These factual matters, involving the nuances of military judgment with respect to the rating and promotion of an individual officer, do not warrant review by this Court.

Moreover, the decision below is correct. The Court of Claims carefully considered petitioner's contentions and concluded that the Assistant Secretary's finding that the

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[1]In our view, the Court of Claims lacked jurisdiction because this case does not involve a claim to "actual, presently due money damages from the United States." *United States* v. *King*, 395 U.S. 1, 3. See our reply brief in *United States* v. *Testan and Zarrilli*, No. 74-753, argued November 12, 1975.

[2]Petitioner also argues (Pet. 10-11) that the Assistant Secretary failed to pay proper deference to the Board's decision. This, too, resolves into an essentially factual contention which was correctly rejected by both the majority (Pet. App. A5, A8-A9) and the concurring judge (Pet. App. A13) below on the ground that the Board's decision itself had not been supported by substantial evidence.

ratings were accurate had substantial support in the record (Pet. App. A3-A9).[3] The court concluded by observing (Pet. App. A9-A10):

> Numerous worthy and qualified officers are passed over annually and never reach the top of their profession. * * * We have not been shown here that any officer with a record comparable to [petitioner's] was promoted ahead of him. There is no showing of bias or prejudice here which might suggest an error or injustice in selection board proceedings. * * *
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> The Correction Board's conclusion in [petitioner's] favor, based entirely on what it described as "reasonable doubt whether he did in fact receive a just and equitable consideration by the permanent lieutenant colonel selection board" does not withstand the contrary analysis and conclusion made in good faith, within the law, and without arbitrariness or caprice by the Assistant Secretary in the present case. To change a record upon such a tenuous basis would be without support in law, unjustified, and unfair to others who in all probability have been passed over with qualifications similar, or superior, to [petitioner's]. * * * Ratings and promotions are discretionary matters with which the court will continue to be "scrupulous not to intervene" unless clear error is shown or relief is mandated by law or regulation. *Orloff* v. *Willoughby*, [345 U.S. 83] at 94.

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[3]In its opinion, the court specifically answered petitioner's various claims of procedural irregularities such as his contentions (Pet. 8-9) that there is no evidence that his performance had been compared with that of other officers (see Pet. App. A8), and that his receipt of a master's degree had not been considered (Pet. App. A8, n. 3).

For the reasons stated above and in the opinion of the Court of Claims, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1976.

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